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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

No. 365

NOAH ADAIR,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a National Banking Association),

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Noah Adair respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to

review a decree of that Court pronounced on June 7, 1937, not yet officially reported. (R. 87-97.) The said Court, by its decree, reverses an order of the District Court of the United States for the Southern District of California, Central Division, overruling objections and exceptions of Respondent to an accounting filed in that Court by Petitioner as Conciliation Commissioner in and for the County of San Bernardino, State of California, and settling and allowing the said accounting. The order of the District Court from which the appeal was taken is not officially reported, but is found in the Transcript of Record at page 31. Within the time provided by law, Petitioner made application for a rehearing, which was denied by the United States Circuit Court of Appeals for the Ninth Circuit July 26, 1937 (R. 98), and pursuant to the application of Petitioner, under Rule 32 of said Court, issuance of mandate was stayed to and including August 30, 1937, and in the event this petition for a writ of certiorari is docketed in the Clerk's Office of the Supreme Court of the United States on or before August 30, 1937, then the mandate is to be stayed until after this Court passes upon this petition.

NATURE OF CASE AND QUESTIONS INVOLVED.

The order of the District Court from which the appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit was made in the course of proceedings initiated by Cuccia, a farm debtor, under the provisions of Section 75 of the National Bankruptcy Act of 1898, as amended. (11

U. S. C. A. Sec. 203.) In accordance with the terms of that statute, Cuccia filed his petition for a composition or extension of time to pay his debts August 6, 1936. (R. 4-9.) This petition was approved by the Court and the proceedings were referred to Petitioner, Noah Adair, Conciliation Commissioner in and for the County of San Bernardino, of the State of California. (R. 13, par. V.)

Thereafter the said Cuccia having failed to make any agreement of composition or extension with his creditors, on the 7th day of January, 1935, filed a petition under the provisions of Section 75 (s) of the Bankruptcy Act as the same existed at that time, whereupon he was adjudged a bankrupt and the proceedings upon the said amended petition were referred to D. W. Richards, as Referee in Bankruptcy in and for the County of San Bernardino, State of California. (R. 13, par. VI.)

On May 27, 1935, the Supreme Court of the United States, in the case of *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, held subsection (s) of Section 75 unconstitutional and void.

On September 26, 1934, Petitioner opened an account in the name of Cuccia and Petitioner with the American National Bank, San Bernardino, California, with a deposit of $1437.37. (R. 17.) This amount represented the proceeds of the sale of a crop, a mortgage on which was held by respondent. (Opinion of the Circuit Court of Appeals, R. 94.)

From September 26, 1934, until June 1, 1935, Petitioner disbursed to Cuccia a total of $1290.33 for labor performed and expenses incurred by Cuccia in

cultivating and harvesting the mortgaged crop. (R. 17, 18. Opinion of Circuit Court of Appeals, R. 94.)

On October 14, 1935, all of the proceedings instituted by Cuccia were dismissed. (R. 13.) It is apparent that the proceedings were dismissed because of the declaration by the Supreme Court that subsection (s) of Section 75, in its original form, was unconstitutional. However, on August 28, 1935, Congress amended Section 75 of the Bankruptcy Act by changing, in respects not material to this case, various subsections thereof, and by enacting a new subsection (s) to take the place of the one declared unconstitutional. (11 U. S. C. A. Sec. 203.)

From the chronological history of this case, as stated thus far, it is apparent that all of the disbursements made by Petitioner were made prior to the order of dismissal of October 14, 1935. It is also apparent that of the total amount disbursed by Petitioner to Cuccia, $516.33 was disbursed prior to the amendment of the petition by Cuccia on January 7, 1935, his adjudication as a bankrupt thereunder, and reference of the proceedings to D. W. Richards, as Referee in Bankruptcy, pursuant thereto. (R. 17.)

Subsequently, Cuccia refiled under the provisions of Section 75, and particularly subsection (s) thereof, as amended and reenacted by Congress on August 28, 1935. Under paragraph 5 of subsection (s) of Section 75, as amended and reenacted, it is provided that all cases which have been dismissed by any conciliation commissioner, referee, or Court because of the Supreme Court's decision holding the former subsection (s) unconstitutional, shall be promptly rein-

stated, without any additional filing fees or charges. (11 U. S. C. A. Sec. 203, as amended August 28, 1935.)

The record herein does not show the details of the reinstatement, but such reinstatement appears by necessary inference from the opinion of the Circuit Court of Appeals, wherein it is stated that "with its subsequent reinstatement we are not here concerned". (R. 94.)

The account of Petitioner was settled and allowed by the District Court on September 14, 1936. (R. 31, 32.) The Circuit Court of Appeals for the Ninth Circuit, however, reversed the order of allowance and charged Petitioner with personal responsibility and liability for the gross proceeds derived from the sale of the crop, to-wit, the sum of $1437.37. (R. 96.)

It does not appear from the record that Petitioner was ever authorized by any order of Court to make the disbursements to Cuccia for labor performed and expenses incurred by Cuccia in cultivating and harvesting the mortgaged crop. But the decision of the Circuit Court of Appeals does not depend upon the absence of an order. That Court said in its opinion, "no conciliation commissioner, trustee, referee, judge, or court could impose this obligation on appellant. Appellee *could not be* and was not authorized to pay Cuccia with appellant's money for performing this obligation". (i. e., the cost of cultivating and harvesting the crop.) (R. 95. Italics ours.)

The following questions are presented by the record:

First. Upon this record, the ostensible question is to what extent a conciliation commissioner, who partakes of the character of a referee in

bankruptcy, is personally liable for expenditures made for the cultivation and harvesting of a crop pursuant to the presumed authority of an unconstitutional statute. The record shows, however, without going into detail, that there was a subsequent reinstatement of the proceedings after they were dismissed because of the unconstitutionality of the original subsection (s) of Section 75 of the Bankruptcy Act. (R. 94.)

In the amendment to Section 75 and the reenactment, in modified form, of subsection (s) thereof, adopted by Congress August 28, 1935, there was in the 5th paragraph of subsection (s) specific provision for the reinstatement of previously dismissed petitions. Reinstatement is tantamount to a restoration of the original proceedings *ab initio*. Can, therefore, this Court do complete justice between the parties without considering the effect of reinstatement, and if the record of reinstatement is insufficient, should not the Circuit Court of Appeals, sitting as a Court of Equity, which is essentially the function of a Bankruptcy Court, have required amendment of the record to show the proceedings resulting in reinstatement?

Second. In view of the fact that Cuccia's petition was reinstated under the terms and provisions of subsection (s) of Section 75 of the Bankruptcy Act, thus validating the proceedings *ab initio*, can it be said that Petitioner's disbursements were made pursuant to the alleged authority of an unconstitutional statute?

Third. Is not a Court officer protected from personal liability in making disbursements under authority of a constitutional statute?

Fourth. In view of the fact that the disbursements in question were absolutely necessary for the protection of the crop, is not the case similar to that of one who creates a fund and consequently is entitled to be reimbursed for the expense involved in its creation?

Fifth. In a case where a farm debtor has filed a petition under Section 75 of the Bankruptcy Act, subsections (a) to (r) inclusive, for composition or extension of time within which to pay his debts; has been adjudicated a bankrupt under the provisions of subsection (s) as enacted by Congress August 28, 1935, may a conciliation commissioner, to whom the matter has been referred, either before or after the adjudication of bankruptcy, expend any part of the proceeds derived from the sale of a mortgaged crop to defray the expense necessary for the production of that crop?

THE REASONS RELIED UPON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

This Court has decided in the case of *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia,* not yet officially reported, but found in Advance Opinions, Vol. 81, Pamphlet No. 11, page 487, L. E., that the situation of the farmer operating under subsection (s) of Section 75 is closely anal-

ogous to that of receivership. Specifically, the language of the Court is:

> "The farmer's proceeding in bankruptcy for rehabilitation resembles that of a corporation for reorganization."
>
> (Advance Sheets, Vol. 81, p. 495, L. E.)

In the same decision, this Court has upheld the fixing of a rental under the terms of subsection (s) of Section 75 and the application thereof to the payment of necessary expenses of operation, such as taxes, upkeep, etc. The Circuit Court of Appeals for the Ninth Circuit has, however, by its decision, held that the entire gross operating revenue of Cuccia's farm must be paid to the secured creditor. This decision, therefore, precludes, in any case where the entire operating revenue of a farm consists of the proceeds to be derived from mortgaged crops, any application of the beneficent and remedial provisions of Section 75 of the Bankruptcy Act and particularly of subsection (s) thereof. If the crop mortgagee is entitled to the gross proceeds, without deduction of the expenses necessarily involved in the production of the crop which yields these proceeds, it is obvious that not only can no rental be fixed, but that the farm cannot be operated, where its entire revenue is derived from the sale of the crops produced. Such a rule is abhorrent to all of the principles involved in receivership practice.

In the *Wright* case, supra, this Court had before it no question involving the rights and priorities of a crop mortgagee, and it therefore has not specifically passed upon the issue presented by this record. The

decision, however, of the United States Circuit Court of Appeals is in direct opposition to the necessary implications of the decision of this Court in the *Wright* case, supra. It is submitted that if this decision stands, the hope of financial rehabilitation extended to the distressed farmer by subsection (s) of Section 75 will be largely, if not entirely, destroyed, and further, that it will in the future be impossible to induce responsible and competent persons to become conciliation commissioners because of the handicaps and perils resulting from this decision.

BRIEF.

A brief in support of this petition is filed herewith.

PRAYER.

Wherefore, your Petitioner prays that this Honorable Court will be pleased to issue its writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said Court: "No. 8350, In the Matter of Bank of America National Trust and Savings Association (a National Banking Association), Appellant, v. Noah Adair, Appellee", to the end that said case may be reviewed and determined by this Court as provided by law, and that said judgment of said United States Circuit Court of Appeals for the Ninth

Circuit may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated, San Francisco, California,
August 20, 1937.

WILLIAM LEMKE,
HAROLD M. SAWYER,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

State of California,
City and County of San Francisco.—ss.

Harold M. Sawyer, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the Petitioner in the above and foregoing cause; that he has read and considered the foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and, in affiant's judgment, such petition is well founded; that this petition is presented in good faith, and the same is not interposed for delay.

HAROLD M. SAWYER.

Subscribed and sworn to before me this 20th day of August, 1937.

(Seal) LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

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No.

NOAH ADAIR,
Petitioner,

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a National Banking Association),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

No opinion appears to have been written or published by the District Court upon the order settling and allowing Petitioner's accounts, but an oral opinion appears in the record. (R. 66.) Upon appeal from the order of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit, the latter Court wrote an opinion, not yet officially reported,

but found at page 88 of the transcript of record. Petition for rehearing was denied by the Circuit Court of Appeals, without opinion. (R. 98.)

II.

JURISDICTION.

1. The date of the decree sought to be reviewed is June 7, 1937, and the date of the denial of the petition for rehearing is July 26, 1937. The mandate has been stayed to and including August 30, 1937, and in the event the petition for a writ of certiorari herein is docketed in the Clerk's Office of this Court on or before said date, then the mandate of the Circuit Court of Appeals is to be stayed until after this Court has passed upon the petition. (R. 99.)

2. Your Petitioner submits that this Honorable Court should review the decision of the Circuit Court of Appeals for the reasons relied upon in the foregoing petition, pages 7 to 9 thereof, which, in the interests of brevity, are not here repeated.

3. The jurisdiction of this Honorable Court is invoked under the provisions of the Judicial Code, Section 240, as amended by the Act of February 15, 1925; 43 Stat. 938; 28 U. S. C. A., Section 347, subdivision (a) thereof, wherein it is provided that it shall be competent for the Supreme Court of the United States, upon the petition of any party to any civil case, to require by certiorari, either before or after a judgment or decree by a Circuit Court of Appeals, that the cause be certified to the Supreme Court for

determination by it, with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal. The Act of Congress involved in these proceedings is Section 75 of the Bankruptcy Act of 1898, as amended, and particularly the amendment to said Section 75 adopted by Congress August 28, 1935.

Section 240 of the Judicial Code and Section 75 of the Bankruptcy Act of 1898, as amended, may be found in full in the appendix to this brief.

4. The following cases are believed to sustain the jurisdiction of this Honorable Court:

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; 79 L. E. 1593;

Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, Vol. 81, Pamphlet No. 11, page 487, L. E.

In both of these cases certiorari was granted by this Honorable Court to review decrees of the Circuit Court of Appeals involving the validity and construction of Section 75 of the National Bankruptcy Act of 1898.

III.

STATEMENT OF THE CASE.

A summary statement of the case appears in the petition filed herewith, but for the sake of completeness and in order to comply with subsection (d) of Section 2 of Rule 27 of this Court, the following statement is made:

The farm debtor Cuccia filed his petition for a composition or extension of time to pay his debts pursuant to the provisions of Section 75 of the National Bankruptcy Act of 1898, subsections (a) to (r), both inclusive, August 6, 1936. (R. 4-9.) This petition was approved by the Court and the proceedings were referred to Petitioner, Noah Adair, Conciliation Commissioner in and for the County of San Bernardino, of the State of California. (R. 13, par. V.)

Thereafter Cuccia, having failed to make any agreement of composition or extension with his creditors, on the 7th day of January, 1935, filed a petition under the provisions of Section 75 (s) of the Bankruptcy Act as the same existed at that time, whereupon he was adjudged a bankrupt and the proceedings upon the said amended petition were referred to D. W. Richards, as Referee in Bankruptcy in and for the County of San Bernardino, State of California. (R. 13, par. VI.)

On May 27, 1935, this Honorable Court, in the case of *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, held subsection (s) of Section 75 unconstitutional and void.

At the time Cuccia filed his original petition, and also when he filed his amended petition and was adjudged a bankrupt, he was the owner of certain ranch property and had executed a deed of trust of this property to Corporation of America, a corporation, as trustee, to secure an obligation of $11,850.00, evidenced by a promissory note made, executed, and delivered to Bank of America National Trust and Sav-

ings Association on December 5, 1930. The latter was named as beneficiary in the deed of trust. (R. 10-12.)

Thereafter, as additional security for the payment of said promissory note, Cuccia made, executed, and delivered to Bank of America National Trust and Savings Association a crop and chattel mortgage dated April 13, 1933, wherein Cuccia mortgaged to the said bank all crops of whatsoever kind or character, including that certain crop of grapes of all varieties then planted or growing, or that may during the years of 1933 and 1934 be planted or grown, or that may be planted or grown prior to the payment in full of the indebtedness secured by said crop and chattel mortgage upon the real property described in the deed of trust. (R. 12.)

Both the deed of trust and crop mortgage were duly recorded.

The crop mortgage, among other things, obligated Cuccia

> "to attend to, care for, cultivate, irrigate and protect said crop or crops hereinabove mentioned and described, in a good, farmerlike manner, and according to the most approved methods of farming, until the same shall be ready for harvesting, and then to harvest and prepare said crop or crops for market, and when said crop or crops are so prepared, to deliver said crop or crops to the mortgagee, who may sell and dispose of the said crops at the then market price and apply the proceeds of said sale toward payment of the notes and obligations secured thereby," (R. 57, 58.)

The mortgage further provided that if Cuccia failed to perform any act which the mortgage obligated him to perform, the mortgagee might perform such act and, in so doing, might expend such sums as it deemed necessary, and that all sums so expended should be immediately due and payable by Cuccia to the mortgagee, and should be secured by the mortgage. (R. 59.)

After the proceedings had been referred to Petitioner, Cuccia harvested the mortgaged crop above referred to and prepared it for market. The crop was not delivered to the mortgagee bank, but was marketed by Petitioner, or by Cuccia under Petitioner's direction, and the gross proceeds, amounting to $1437.37, were deposited in American National Bank, San Bernardino, California, in the joint name of Cuccia and Petitioner. (R. 17. Opinion of Circuit Court of Appeals, R. 93.)

From September 26, 1934, until June 1, 1935, Petitioner disbursed to Cuccia a total of $1290.33 for labor performed and expenses incurred by Cuccia in cultivating and harvesting the mortgaged crop. (R. 17, 18. Opinion of Circuit Court of Appeals, R. 94.)

The production of crops and the moneys produced from the sale thereof constituted the sole operating revenue derived from Cuccia's ranch. This statement does not expressly appear in the record, but it was asserted in Petitioner's opening brief on page 4 in the Court below, and the assertion has never been challenged.

On October 14, 1935, the proceedings instituted by Cuccia were dismissed. (R. 13.) It is apparent that the proceedings were dismissed because of the declaration by the Supreme Court that subsection (s) of Section 75, in its original form, was unconstitutional. However, on August 28, 1935, Congress amended Section 75 of the Bankruptcy Act by changing, in respects not material to this case, various subsections thereof, and by enacting a new subsection (s) to take the place of the one declared unconstitutional. (11 U. S. C. A., Sec. 203.)

On September 14, 1936, Petitioner's account was settled and allowed and he was permitted to take credit for the $1290.33 disbursed to Cuccia, as aforesaid. (R. 31, 32.)

From the chronological history of the case, as stated thus far, it is apparent that all of the disbursements made by Petitioner were made prior to the order of dismissal of October 14, 1935. It is also apparent that of the total amount disbursed by Petitioner to Cuccia, $516.33 was disbursed prior to the amendment of the petition by Cuccia on January 7, 1935, his adjudication as a bankrupt thereunder, and reference of the proceedings to D. W. Richards, as Referee in Bankruptcy, pursuant thereto. (R. 17.)

Prior to the order of September 14, 1936, settling and allowing Petitioner's account, Cuccia on March 16, 1936, filed a petition for reinstatement under the terms and provisions of paragraph 5 of subsection (s) as reenacted by Congress on August 28, 1935, and on the same day the Court entered an order reinstat-

ing the proceedings which had previously been dismissed on October 14, 1935. (*Bank of America National Trust and Savings Association v. Cuccia*, 90 Fed. (2d) 100, at 101.) The Court below took the position that it was not concerned with this reinstatement. (R. 94.)

On June 7, 1937, the Circuit Court of Appeals reversed the order settling and allowing Petitioner's accounts and charged him with personal liability for the payment to Bank of America National Trust and Savings Association of the full sum of $1437.37, being the gross proceeds derived from the sale of the mortgaged crop. (R. 96.)

IV.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals for the Ninth Circuit erred in completely disregarding the effect of the order made by the District Court on March 16, 1936, reinstating Cuccia's proceedings pursuant to the terms of paragraph 5 of subsection (s) as reenacted by Congress on August 28, 1935, and in failing to require amendment of record to show such proceedings if, in the opinion of the Court, the record before it was insufficient for such purpose.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that Petitioner is personally liable for disbursements made by him pursuant to the authority of a constitutional statute and in his capacity as Conciliation Commissioner for the County

of San Bernardino, State of California, and officer of the Court.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the cost of cultivating and harvesting the mortgaged crop was not a proper charge against the gross proceeds derived from the sale of the crop.

4. The Circuit Court of Appeals for the Ninth Circuit erred in holding, contrary to the universal view, that the cost of creating a fund should not be charged against the fund.

5. The Circuit Court of Appeals for the Ninth Circuit erred in holding that in a case where a farm debtor has filed a petition under Section 75 of the Bankruptcy Act, subsections (a) to (r) inclusive, for composition or extension of time within which to pay his debts; has been adjudicated a bankrupt under the provisions of subsection (s) as enacted by Congress on August 28, 1935, a conciliation commissioner, to whom the matter has been referred, either before or after the adjudication of bankruptcy, may not expend any part of the proceeds derived from the sale of a mortgaged crop to defray the expense necessary for the production of that crop, and that if he does so, he is personally liable to the crop mortgagee for the expenditure.

V.

SUMMARY OF ARGUMENT.

1. The order of the District Court of March 16, 1936, reinstating the proceedings originally filed by Cuccia, validated those proceedings *ab initio*. And although the disbursements might originally have been made by Petitioner pursuant to the supposed authority of an Act subsequently declared unconstitutional, nevertheless the reinstatement made pursuant to a subsequent constitutional Act validates and justifies the disbursements.

2. Petitioner was a referee in bankruptcy, known as a conciliation commissioner. He was an officer of the Court and, as such, should not be held personally liable for expenditures made under the authority of constitutional legislation.

3. The situation of a distressed farm debtor who has availed himself of the procedure afforded by Section 75 of the National Bankruptcy Act has been characterized by this Honorable Court as analogous to that of receivership. The cost of cultivating and harvesting the mortgaged crop was a legitimate and necessary expense, and therefore, under settled principles of receivership practices, was a proper charge against the gross proceeds derived from the sale of the crop.

4. Wherever a fund is created for the benefit of those who did not participate in the creation of the fund, the necessary expense involved is a proper charge against the fund.

5. Section 75, in its entirety, contemplates the financial rehabilitation of the farm debtor by leaving him in possession of his property under the supervision and control of the Court, freed from the hampering restrictions of adversary action by his creditors, to the end that he may, during the period of rehabilitation, have an opportunity to work out of his difficulties by gradually reducing his obligations. Like any other receivership, the plan is entirely unworkable unless a part, at least, of the gross operating revenue can be used to defray the cost of operation. The period of rehabilitation is a "breathing space" and the essence of a breathing space is opportunity to breathe; if, therefore, the supply of oxygen is cut off at the very start, the breathing space becomes nothing but a cruel illusion.

VI.

ARGUMENT.

FIRST SPECIFICATION OF ERROR.

THE QUESTION PRESENTED IN THIS CASE CANNOT FAIRLY AND EQUITABLY BE DETERMINED WITHOUT TAKING INTO CONSIDERATION THE REINSTATEMENT OF THE PROCEEDINGS OF CUCCIA UNDER SECTION 75 OF THE NATIONAL BANKRUPTCY ACT, ACCOMPLISHED BY THE ORDER OF REINSTATEMENT MADE MARCH 16, 1936.

Section 75 of the Bankruptcy Act, in its original form, embraced only subsections (a) to (r) inclusive. It was passed March 3, 1933. (47 Stat. at L. 1467, Chap. 204.) The original subsection (s) was no part of it, and was not added until June 28, 1934, at which

time this subsection, popularly known as the Frazier-Lemke Act, was passed. (48 Stat. at L. 1289, Chap. 869.) The original subsection (s) was an essential part of the scheme of farm debtor rehabilitation. Before this subsection was added to the statute, it provided merely for an opportunity for the farmer to endeavor to effect a composition of his debts or extension of time within which to pay them. No relief was afforded for the situation where the composition or extension could not be effected. It was readily seen that the plan of rehabilitation would have to be implemented with the creation of something analogous to a receivership for the farm debtor. Under these circumstances, the original Frazier-Lemke Act was passed.

Ultimately, this Act was declared unconstitutional by this Honorable Court in the *Radford* case, supra. After careful consideration of the views of this Court expressed in the *Radford* case, Congress on August 28, 1935, amended, in some particulars not material to this discussion, portions of Section 75 as originally enacted, and reenacted a new subsection (s) to take the place of the original Frazier-Lemke Act.

During the interval of time that elapsed between the declaration of unconstitutionality in the *Radford* case and the passage of the new subsection (s) on August 28, 1935, there had been wholesale dismissals of proceedings taken pursuant to the supposed authority of the original Frazier-Lemke Act. Accordingly, Congress made provision for this situation, at least in so far as was possible where no vested rights

had accrued by reason of foreclosure sales conducted in the interim. The provision is found in the 5th paragraph of the new subsection (s) and is to the effect that "all cases that have been dismissed by any conciliation commissioner, referee, or Court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges",

In other words, the intent of Congress was to bridge over the gap between the date of the *Radford* decision and the date of the new Act, so that where no intervening vested rights had accrued in the meantime, there should be unbroken continuity from the time when the farm debtor filed his original petition praying for a composition or extension.

The case, in its broad aspects, should be treated as if the proceedings had been continuous from inception and there had been no dismissal on October 14, 1935, following the decision in the *Radford* case.

It may be urged that the issue is far simpler and presents nothing but a case of expenditures made under the presumed authority of an unconstitutional Act, and that therefore the Circuit Court of Appeals was right in saying that it was not concerned with the proceedings for reinstatement. This, however, is too narrow an approach. Prior to the order of the District Court of September 14, 1936, settling and allowing Petitioner's accounts, the proceedings had already been reinstated by the order of the same District Court of March 16, 1936. It is true that these reinstatement proceedings are not set forth in the

record which was before the Circuit Court of Appeals, but nevertheless, prior to the decision of that Court of June 7, 1937, reversing the District Court's order settling and allowing the Petitioner's accounts, the same Circuit Court of Appeals on May 4, 1937, rendered a decision in the case of *Bank of America National Trust and Savings Association v. Cuccia* (90 Fed. (2d) 100), in which it narrated the history of the reinstatement proceedings. It therefore could have taken judicial notice of its own records and, to that extent, supplied any deficiencies in the record before it in the instant case.

The reason why the Circuit Court of Appeals should have considered the reinstatement proceedings is because the pronouncements of this Honorable Court in the *Wright* case, supra, are directly applicable to the Cuccia proceedings, viewed as a whole. Hence Petitioner's insistence that the Circuit Court of Appeals should have considered the effect of reinstatement, and his equal insistence that this Honorable Court should do so.

It may also be urged that a distinction must be made between expenditures made by Petitioner before and after Cuccia was adjudicated a bankrupt pursuant to the terms of the original subsection (s). This, however, is another narrow, legalistic distinction, which should not obscure the broad view of the proceedings contemplated as a continuous whole from inception.

SECOND SPECIFICATION OF ERROR.

THE COURT BELOW ERRED IN HOLDING PETITIONER PERSONALLY LIABLE FOR DISBURSEMENTS MADE BY HIM PURSUANT TO AUTHORITY OF A CONSTITUTIONAL STATUTE, AND IN HIS CAPACITY AS CONCILIATION COMMISSIONER FOR THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AND OFFICER OF THE COURT.

This Court has said in the *Wright* case, supra, that the status of a farm debtor under Section 75 is substantially that of receivership, except that the farm debtor is himself his own receiver. In some respects, a conciliation commissioner partakes of the function of a receiver. The farm debtor and all of his property, wherever situated, is subject to the exclusive jurisdiction of the Court (Sec. 75, subsection (n)), and the conciliation commissioner is the instrumentality through which the Court exercises its supervision over the farm debtor and his property.

It is well settled that in the absence of any personal or individual misconduct on the part of a receiver, his liability is official rather than personal. (*McNulta v. Lochridge,* 141 U. S. 327, 35 L. Ed. 796; *Texas & Pacific R. Co. v. Cox,* 145 U. S. 593, 36 L. Ed. 829; *Archambeau v. Platt,* 173 Mass. 249, 53 N. E. 816; *McNulta v. Ensch,* 134 Ill. 46, 24 N. E. 631; *Robinson v. Kirkwood,* 91 Ill. App. 54; *Rosso v. Freeman,* 30 Fed. (2d) 826.)

A receiver obeying the orders of the Court is not a guarantor of the correctness of the Court's rulings. Furthermore, when a receiver has paid out money or the fund in his hands in good faith and in obedience to the orders of the Court appointing him, he cannot

be compelled to make restitution and he is not personally responsible. If the Court has jurisdiction of the parties and the subject-matter, yet commits a legal error in the disposition of the fund, the receiver, because he is obliged to obey such an incorrect order, is protected. (*Clark on Receivers,* Second Edition, Vol. 1, Sec. 388, page 504.)

It is true that in this case no order was made authorizing Petitioner to make the disbursements to Cuccia. But the decision of the Circuit Court of Appeals was not based upon the lack of an order. That Court said:

> "This order must be reversed. The entire proceeds of the mortgaged crop belonged to appellant. Appellant was under no obligation to cultivate or harvest the crop or to pay Cuccia for doing so. Cuccia was expressly obligated to do these things himself, at his own expense. No conciliation commissioner, trustee, referee, judge or court could impose this obligation on appellant. Appellee (i. e., Adair), therefore, could not be and was not authorized or empowered to pay Cuccia, with appellant's money, for performing this obligation." (R. 95.)

Petitioner acted in the *utmost good faith,* and he should be protected under the principle that while acting in his official capacity as an officer of the Court, he cannot be held personally liable for acts performed in good faith where the Court had jurisdiction of the parties and of the subject-matter.

THIRD SPECIFICATION OF ERROR.

THE COURT BELOW ERRED IN HOLDING THAT THE COST OF CULTIVATING AND HARVESTING THE MORTGAGED CROP WAS NOT A PROPER CHARGE AGAINST THE GROSS PROCEEDS DERIVED FROM THE SALE OF THE CROP.

The discussion of this specification of error will be combined with the argument to be made under the fifth specification of error.

FOURTH SPECIFICATION OF ERROR.

THE COURT BELOW ERRED IN HOLDING, CONTRARY TO THE UNIVERSAL VIEW, THAT THE COST OF CREATING A FUND SHOULD NOT BE CHARGED AGAINST THE FUND.

Cultivating and harvesting of a crop is analogous to the creation of a fund. The work of cultivating and harvesting produces the crop which, upon sale, is turned into a fund consisting of the gross proceeds of sale. Obviously, there can be no crop unless there is cultivation and harvesting. Hence the cost of cultivating and harvesting, represented by the disbursements which Petitioner made to Cuccia, should have been deducted from the gross proceeds of sale and Petitioner's account should have been settled upon that basis.

It was said in *In re Torchia,* 185 Fed. 576, at 582, that it is the undoubted rule that the expenses of creating a fund should be paid out of it, including reasonable compensation to the parties who have been instrumental in creating the fund. In this case, certain creditors were saved expense because of certain

action taken by the referee and trustee, and it was held that these creditors ought to, in equity and good conscience, be willing that the referee and trustee's commissions and expenses should be allowed and paid out of the fund.

This principle is peculiarly applicable to the instant case. The property involved in this case consisted of a tract of land in San Bernardino County and a crop of grapes growing thereon. (R. 90.) These grapes were perishable and so was the vineyard itself. The production of a crop of grapes involves a long process of husbandry, and if any essential steps are omitted, there will be no crop. If Petitioner and Cuccia had refused to take any steps at all, what would have been the situation? Either the crop would have been lost, or, under the terms of the crop mortgage, the bank would have been obliged to expend all the money necessary to produce the crop.

What is the difference between expenditure by the bank and expenditure by Petitioner to produce the same result, namely, the production of the crop? To be sure, the bank, if it had spent the money necessary to produce the crop, as it might have done under the crop mortgage in the event of Cuccia's failure to do so, could have added that expense to the debt, but how has the bank been hurt by the diversion of money to Cuccia for the production of the crop, when if Cuccia had refused to take action, the bank would have had to expend the same amount of money to produce an identical crop? As the situation now stands, the bank

is awarded the entire gross proceeds of sale without any deduction whatever for the cost of producing the crop.

It is common practice to deduct from gross sales commissions and expense, if there is any, necessarily involved in making the sale. Why, under the same principle, cannot the cost of producing the crop likewise be deducted from the gross proceeds? The ruling of the Court below is tantamount to an unjust enrichment of the bank to the extent of cost of production and at the expense of an innocent third party, your Petitioner.

Suits by stockholders in which they assert a cause of action which actually belongs to the corporation, but which its directors refuse to assert, furnish another example of the principle that those who take the initiative in creating a fund are entitled to be reimbursed for the expense incurred in so doing. In all such cases, the expense is regularly charged against the fund. (*Nolte et al. v. Hudson Nav. Co.*, 47 Fed. (2d) 166; *Hutchinson Box Board & Paper Co. v. Van Horn*, 299 Fed. 424; *McCourt v. Singers-Bigger*, 145 Fed. 103; *Meeker v. Winthrop Iron Co.*, 17 Fed. 48.)

It is submitted, both upon principle and authority, that the order of the District Court settling and allowing Petitioner's accounts was right, and that the Circuit Court of Appeals was wrong in charging Petitioner personally with the amount of the disbursements made by him to Cuccia for cultivating and harvesting the crop.

FIFTH SPECIFICATION OF ERROR.

THE COURT BELOW ERRED IN HOLDING THAT IN A CASE WHERE A FARM DEBTOR HAS FILED A PETITION UNDER SECTION 75 OF THE BANKRUPTCY ACT, SUBSECTIONS (a) TO (r) INCLUSIVE, FOR COMPOSITION OR EXTENSION OF TIME WITHIN WHICH TO PAY HIS DEBTS; HAS BEEN ADJUDICATED A BANKRUPT UNDER THE PROVISIONS OF SUBSECTION (s) AS ENACTED BY CONGRESS ON AUGUST 28, 1935, A CONCILIATION COMMISSIONER, TO WHOM THE MATTER HAS BEEN REFERRED, EITHER BEFORE OR AFTER THE ADJUDICATION OF BANKRUPTCY, MAY NOT EXPEND ANY PART OF THE PROCEEDS DERIVED FROM THE SALE OF A MORTGAGED CROP TO DEFRAY THE EXPENSE NECESSARY FOR THE PRODUCTION OF THAT CROP, AND THAT IF HE DOES SO, HE IS PERSONALLY LIABLE TO THE CROP MORTGAGEE FOR THE EXPENDITURE.

In order to find the solution of the problem presented by this specification of error, it is necessary to consider Section 75 of the Bankruptcy Act in its entirety and as an expression by Congress of a public policy with respect to farm debt.

The Circuit Court of Appeals has in its decision completely ignored the purpose to be accomplished by the Act, and it has failed to appreciate that it was dealing with what is essentially a receivership situation. It is submitted that the conclusions reached by the Court below are entirely at variance with the necessary implications of the *Wright* case, supra.

In the Court below, the respondent bank relied almost exclusively on cases defining the rights of secured creditors under the Bankruptcy Act as it stood prior to the amendments of 1933, embraced in Sections 74, 75, etc. It was stated in respondent bank's opening

brief in the Court below that under ordinary bankruptcy proceedings there would be no doubt whatever of the bank's right to receive the proceeds of the sale of the crops constituting a part of the security for the indebtedness due it. It was also said that under well established bankruptcy practice, summary process will lie to compel the trustee in bankruptcy to deliver property in his possession to the person entitled thereto. It was urged that there is nothing contained in Section 75 of the Bankruptcy Act which authorized any variance from these well established principles of bankruptcy procedure.

Petitioner has no quarrel with this statement of the law as it existed prior to the adoption of Section 75. Until that section was enacted, the Bankruptcy Court had little or no jurisdiction over a secured creditor and certainly could not prevent him from realizing upon his security if that security had been honestly obtained in such manner as to involve neither a preference nor a fraudulent transfer.

We cannot agree, however, that the situation remains unchanged by Section 75. The truth of the matter is that Section 75, and particularly subsection (s) declared constitutional in the *Wright* case, supra, has radically changed all classical conceptions of bankruptcy practice. This can clearly be seen from a comparison of those established principles with the situation created under Section 75.

In the first place, subsections (a) to (r) of Section 75 contemplate a procedure which involves no adjudication in bankruptcy. Subsection (l) of Section

75 provides, first, for absolute dismissal upon distribution of the consideration for composition, and, second, discretionary retention of jurisdiction in the event that an extension of time of the payment of debts is obtained. Subsection (n) provides that the jurisdiction and powers of the Court, etc., shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition was filed with the Court.

In the second place, there is no specific provision in the whole section for the appointment of a trustee.

In the third place, winding up of the estate and distribution of the net proceeds in the shape of dividends to creditors is not the purpose of proceedings under Section 75.

Adjudication in bankruptcy, appointment of a trustee, winding up of the estate and distribution of proceeds ratably among creditors, are of the essence of the former bankruptcy practice. Section 75, however, in all of its aspects, contemplates retention of possession and title subject to encumbrances by the farmer himself under the supervision and jurisdiction of the Court. This is a radically new conception of bankruptcy law and it is futile to look to authority governing the prior bankruptcy practice as a criterion for the determination of problems arising under this new procedure.

Most important of all are the radically new provisions providing for retention by the farmer of his property after amendment of his petition and ad-

judication as a bankrupt, pursuant to subsection (s), for a period of three years, provided a reasonable rental is paid during the period. Equally radical is the stay of all adversary action by creditors for the collection of obligations secured or unsecured, or designed to impair the farmer's right to possession during the period of the three years' stay.

Furthermore, there is no express provision in Section 75 for the appointment of either a receiver or a trustee. On the contrary, the Act specifically provides that if at the time the farm debtor amends his petition and asks to be adjudged a bankrupt and a receiver is in charge of any of his property, such receiver shall be divested of possession of his property and the property returned to the possession of such farm debtor. (Section 75, subsection (s), Par. 4.)

In effect, the farm debtor is his own receiver, limited in his operations by the orders and directions of the Court. (Section 75, subsection (s), Par. 2.)

The problems presented by this entirely new procedure are not to be solved by reference to authority derived from the old bankruptcy practice. The Court has to blaze a new path, bearing in mind that the purpose of the Act is not to divest the farm debtor of his property, but, on the contrary, to enable him to retain it for the purpose of accomplishing his financial rehabilitation. (Section 75, subsection (s), Par. 2.)

In the *Wright* case, supra, this Court, by unanimous decision, held on March 29, 1937, that the new subsection (s) of Section 75 is constitutional to its full extent. Starting, therefore, with the premise that sub-

section (s) is valid, the Courts must now render their aid to its effective administration in accordance with the public policy expressed therein and the purposes to be accomplished thereby.

The paramount purpose of Section 75, and particularly subsection (s) thereof, is to prevent immediate foreclosure in a time of severe depression which, without the fault of the debtor, has resulted in the destruction of farm values and the values of agricultural products. The method of prevention is to suspend during a reasonable period the enforcement of the strict letter of the debtor's obligations and during the period of suspension to leave the debtor in possession and management of his property under the jurisdiction and supervision of the Court.

The situation is analogous to the old equity practice of administering railroads and corporations through the instrumentality of receivership, a practice which has been largely superseded by the relief afforded under Section 77 (b) of the National Bankruptcy Act. Under receivership, or under Section 77 (b), the purpose is to preserve the corpus of the estate, to suspend adversary action by creditors, and to effect a rehabilitation. In every case of such administration under the jurisdiction of a Court, whether by the method of equitable receivership or under Section 77 (b), much of the gross revenue derived from operation must, in the very nature of the case, be diverted from even secured creditors. If it is not permissible to divert revenue from operation to the payment of operating expenses, it is obvious

that the whole plan of receivership, or operation under Section 77 (b), becomes impossible of accomplishment.

The condition of the farm debtor is in no respect different from that of any other embarrassed debtor operating under judicial supervision. The farm ceases to be a going concern unless a portion, at least, of its revenues can be devoted to preservation and production.

Operation of the farm under supervision of the Court is a virtual receivership, and if the lien of the crop mortgage covers every dollar of gross proceeds derived from operation of the ranch and must be paid to the crop mortgagee, subsection (s) of Section 75 becomes a dead letter in every case where there is a continuing crop mortgage given as additional security for a promissory note already secured by a deed of trust to the land.

In the *Wright* case, supra, this Court recognized that the situation of the farmer operating under subsection (s) of Section 75 is closely analogous to that of receivership. We quote from the opinion of the Court as follows:

> "(a) The argument is that possession by the mortgagor during the stay is necessarily less favorable to the mortgagee than possession by a receiver or trustee would be. This is not true. The mortgagor is in default, but it is not therefore to be assumed that he is a wrongdoer, or incompetent to conduct farming operations. The legislation is designed to aid victims of the general economic depression. The mortgagor is familiar with the property, and presumably vitally

interested in preserving ownership thereof and ready to exert himself to the uttermost to that end. It is not unreasonable to assume that, under these circumstances, the interests of all concerned will be better served by leaving him in possession than by installing a disinterested receiver or trustee. For the mortgagor holds possession charged with obligations imposed for the benefit of the mortgagee as fully as if the property were in the possession of a receiver or trustee and there is probably a saving of expense. In order to protect the creditor's interest, the possession is at all times subject to the supervision and control of the Court; and if the debtor 'at any time' fails to comply with orders of the Court issued in the exercise of its supervisory power to protect the mortgagee against waste or other abuse of his possession by the mortgagor, the Court may order the property sold. *The farmer's proceeding in bankruptcy for rehabilitation resembles that of a corporation for reorganization.* As to the latter, it is expressly provided that the debtor may, to some extent, be left in possession, U. S. Code Title 11, Sec. 207 (c); and it is common practice to appoint as receivers one of the officials of the corporation." (Italics ours.) (Advance Sheets, Vol. 81, p. 495, L. E.)

Paragraph 2 of subsection (s) provides for a retention of the farm property by the debtor during the period of the stay, provided that he pays a reasonable rental, which is to be fixed by the Court. Rental implies that the creditors, secured and unsecured, shall get part, but not all, of the products of the farm in a case where the farm produces no other revenue except that derived from the production and sale of its

crops, as is the case here. The paragraph further provides for the application of the rental, which is to be used first for the payment of taxes and upkeep of the property, and the remainder to be distributed among secured and unsecured creditors and applied on their claims as their interests may appear.

In the *Wright* case, supra, this Court has specifically authorized the application of rental provided for in paragraph 2 of subsection (s). This Court has further held that it may enjoin an action by a mortgagee which would tend to defeat the purpose of subsection (s) to effect rehabilitation of the farm debtor. And lastly, it has unequivocally held that the provisions of subsection (s) make no unreasonable modification of the mortgagee's rights.

It is only fair to observe that this Court, in the *Wright* case, supra, was not dealing with the position of a crop mortgagee, nor with the particular problem under discussion. Nevertheless, the Court clearly recognized that any system of rental and application thereof, such as is provided for in paragraph 2 of subsection (s), "takes the income from the mortgagee". It approves this practice and says that it is the standard practice in receiverships.

The decision of the Circuit Court of Appeals precludes, in the case of a continuing crop mortgage, any application of the beneficent and remedial provisions of Section 75, and particularly of subsection (s) thereof. If the crop mortgagee is entitled to the gross proceeds without deduction of the expense necessarily involved in the production of the crop which yields these proceeds, it is obvious that not only can no

rental be fixed, but that the farm cannot be operated where its entire revenue is derived from the sale of the crops produced. Such a result is abhorrent to all of the principles involved in receivership practice. To deny to the farmer, as his own receiver, the benefit of the application of principles governing receiverships in general is to discriminate against the farmer as compared with all other receivers.

It can scarcely be denied, in view of the *Wright* case, supra, that notwithstanding the terms of any mortgage, the Court is vested with the exclusive jurisdiction of the farmer and all of his property, and that the farmer, under the supervision of the Court, is himself a virtual receiver. There is, likewise, no escape from the conclusion that an essential feature of successful administration under a receiver is the power to utilize such portion of the gross revenue as is necessary successfully to maintain, preserve, and operate the property. These conclusions are entirely incompatible with any rule which gives to a crop mortgagee, no matter how artfully the terms of the mortgage may be drafted, the right to the entire proceeds resulting from the sale of a crop. What receiver can operate property when the entire gross operating revenue must be paid to a secured creditor? The question answers itself and emphasizes the error into which the Court below has fallen.

The principle announced by the Circuit Court of Appeals in its decision in this case will practically destroy any possibility of farm debt adjustment, at least in the State of California. Practically without exception, every conciliation commissioner in the State

of California, when confronted with a crop mortgage, has, perforce, been obliged to appropriate a portion, at least, of the proceeds derived from the sale of the crop to defray the expenses of its production. Section 75 of the Bankruptcy Act, and particularly subsection (s), is entirely unworkable in the absence of such a procedure in cases where there is a continuing crop mortgage. Continuing crop mortgages are exceedingly prevalent in California. The result of the decision of the Circuit Court of Appeals, unless it be modified or reversed, will be: first, that no farm debtor will have any incentive to remain on his property, and he will be deprived utterly of any hope of financial rehabilitation; second, if he does not remain upon his property, he is very likely to become a charge upon the relief rolls of either the State or the Federal Government; and, third, no person in his right mind will assume the position of conciliation commissioner in view of the personal liability attaching to his office under the instant decision.

It is therefore respectfully submitted that the writ should issue in accordance with the prayer of the Petitioner.

Dated, San Francisco, California,
August 20, 1937.

Respectfully submitted,
WILLIAM LEMKE,
HAROLD M. SAWYER,
Attorneys for Petitioner.

Receipt of a copy of the within Petition and Brief is hereby admitted at San Francisco, California, this 23rd day of August, 1937.

Edmund Nelson
Hugo Steinmeyer
~~Leslie Jarman~~

Attorney for Respondent.

(Appendix Follows.)

Appendix

Judicial Code, Section 347, as amended (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.

(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal

shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

Section 75 of the National Bankruptcy Act. (July 1, 1898, c. 541, Sec. 75, as added Mar. 3, 1933, c. 204, Sec. 1, 47 Stat. 1470; June 7, 1934, c. 424, Secs. 8, 9, 48 Stat. 925; June 28, 1934, c. 869, 48 Stat. 1289; May 15, 1935, c. 114, Sec. 3, 49 Stat. 246; Aug. 28, 1935, c. 792, Secs. 1-6, 49 Stat. 942-945). U. S. C. A., Title 11, Sec. 203.

Agricultural compositions and extensions.

(a) *Conciliation commissioners; appointment; qualifications; term of office.*

Within thirty days after June 7, 1934, every court of bankruptcy of which the jurisdiction or territory includes a county or counties having an agricultural population (according to the last available United States census) of five hundred or more farmers shall appoint one or more referees to be known as "conciliation commissioners", one such conciliation commissioner to be appointed for each county having an agricultural population of five hundred or more farmers according to said census: *Provided further,* That where any county in any such district contains a smaller number of farmers according to said census, for the purposes of this paragraph such county shall be included with one or more adjacent counties where

the population of the counties so combined includes five hundred or more farmers, according to said census. In case more than one conciliation commissioner is appointed for a county, each commissioner shall act separately and shall have such territorial jurisdiction within the county as the court shall specify. A conciliation commissioner shall have a term of office of one year and may be removed by the court if his services are no longer needed or for other cause. No individual shall be eligible to appointment as a conciliation commissioner unless he is eligible for appointment as a referee and in addition is a resident of the county, familiar with agricultural conditions therein and not engaged in the farm-mortgage business, the business of financing farmers or transactions in agricultural commodities or the business of marketing or dealing in agricultural commodities or of furnishing agricultural supplies. In each judicial district the court may, if it finds it necessary or desirable, appoint a suitable person as a supervising conciliation commissioner. The supervising conciliation commissioner shall have such supervisory functions under this section as the court may by order specify.

(b) *Fee on filing petition; compensation and fees of conciliation commissioners; general orders to govern office of commissioner.*

Upon filing of any petition by a farmer under this section there shall be paid a fee of $10, to be transmitted to the clerk of the court and covered into the Treasury. The conciliation commissioner shall receive as compensation for his services, including all ex-

penses, a fee of $25 for each case docketed and submitted to him, to be paid out of the Treasury. A supervising conciliation commissioner shall receive, as compensation for his services, a per diem allowance to be fixed by the court, in an amount not in excess of $5 per day, together with subsistence and travel expenses in accordance with the law applicable to officers of the Department of Justice. Such compensation and expenses shall be paid out of the Treasury. If the creditors at any time desire supervision over the farming operations of a farmer, the cost of such supervision shall be borne by such creditors or by the farmer, as may be agreed upon by them, but in no instance shall the farmer be required to pay more than one-half of the cost of such supervision. Nothing contained in this section shall prevent a conciliation commissioner who supervises such farming operations from receiving such compensation therefor as may be so agreed upon. No fees, costs, or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided. The conciliation commissioner may accept and avail himself of office space, equipment and assistance furnished him by other Federal officials or by any State, county or other public officials. The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but any district court of the United States may, for

good cause shown and in the interests of justice, permit any such general order to be waived.

This section has been amended as follows:

Subsection (b) (second sentence).

"The conciliation commissioner shall receive as compensation for his services a fee of $25 for each case submitted to him, and when docketed, to be paid out of the Treasury.

(c) *Limitation on time for filing petition; schedules; stay of adjudication order.*

At any time within five years after March 3, 1933, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which the farmer resides and promptly transmitted by him to the clerk of the court for filing. If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section.

(d) *Filing inventory of estate.*

After the filing of such petition or answer by the farmer, the farmer shall, within such time and in such form as the rules provide, file an inventory of his estate.

(e) *Meeting of creditors; notice; examination of former; time for application for confirmation; control of property.*

The conciliation commissioner shall promptly call the first meeting of creditors, stating in the notice that the farmer proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the farmer's indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and unsecured creditors, with the amounts owing to each as shown by the schedules. At the first meeting of the creditors the farmer may be examined, and the creditors may appoint a committee to submit to the conciliation commissioner a supplementary inventory of the farmer's estate. The conciliation commissioner shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made, and may later extend such time for cause shown. After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.

(f) *Final inventory.*

There shall be prepared by, or under the supervision of, the conciliation commissioner a final inventory of the farmer's estate, and in the preparation of such inventory the commissioner shall give due consideration to the inventory filed by the farmer and to any

supplementary inventory filed by a committee of the creditors.

(g) *Acceptance by creditors as prerequisite to filing application for confirmation.*

An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after but not before (1) it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims, and (2) the money or security necessary to pay all debts which have priority unless waived, and in case of a composition, the consideration to be paid by the farmer to his creditors has been deposited in such place as shall be designated by and subject to the order of the court.

This section was amended as follows:

"(g) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims." (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)

(h) *Date and place of hearing on application for confirmation.*

A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing

upon each application for the confirmation of the composition or extension proposal and upon such objections as may be made to its confirmation.

(i) *Confirmation of proposal; conditions precedent.*

The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

(j) *Terms of proposal; payments; supervision of property; exemptions to debtors.*

The terms of a composition or extension proposal may extend the time of payment of either secured or unsecured debts, or both, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the farmer during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control by the conciliation commissioner over the farmer's affairs during such period, and for the termination of such period of supervision or control under conditions specified: *Provided,* That the provisions of

this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under section 24 of this title, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

(k) *Binding effect of confirmation; impairment of liens of secured creditors.*

Upon its confirmation a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided,* That such composition or extension shall not reduce the amount of nor impair the lien of any secured creditor, but shall affect only the time and method of its liquidation.

This section was amended as follows:

"(k) *Binding effect of confirmation; impairment of liens of secured creditors; reduction in interest rate.*

Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided, however,* That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time that the extension and/or composition is accepted, but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured." (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)

(l) *Distribution of consideration on confirmation; priority of debts; modification of setting aside terms of proposal.*

Upon the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed: *Provided,* That the debts having priority of payment under section 104 of this title, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition or settlement herein provided for. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal. The court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the court, set the same aside, reinstate the case, and modify the terms of the extension proposal.

(m) *Setting aside confirmation for fraud.*

The judge may, upon the application of any party in interest, file at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and

that knowledge thereof has come to the petitioners since the confirmation thereof.

(n) *Jurisdiction of court over debtor and property on filing of petition or answer.*

The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed.

This section was amended as follows:

"(n) *Jurisdiction of court over debtor and property on filing of petition or answer; extension of periods of redemption.*

The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among

others, contracts for purchase, contracts for deed, or conditional sales contracts, the right of redemption where the period of redemption has not, or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the con-

ciliation commissioner for the purpose of forwarding same to the clerk of court." (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)

(o) *Exemption of farmer and property from proceedings for enforcement of claims.*

Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel

mortgage, conditional sale agreement, crop payment agreement, or mortgage.

(p) *Application of exemptions from proceedings to enforce claims.*

The prohibitions of subdivision (o) shall not apply to proceedings for the collection of taxes, or interest or penalties with respect thereto, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his family.

This section was amended as follows:

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act." (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)

(q) *Conciliation commissioner to assist in filing petition and subsequent proceedings without services of attorney.*

A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section.

(r) *Farmer defined.*

For the purpose of this section and section 74, the term "farmer" means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such farming operations occur.

This section was amended as follows:

"(r) For the purposes of this section, section 4(b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur." (U.S.C.A. Title 11, Sec. 203 (as amended May 15, 1935).)

(s) *Adjudication as bankrupt on failure of proposal; stay of other proceedings against debtor; purchase of property by debtor; application of section to former cases.*

Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose

claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: *Provided,* That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1). After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that

the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the

creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided,* That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a réappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided,* That upon request in writing by any secured creditor or creditors, the court shall order

the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.

(4) The conciliation commissioner, appointed under subsection (a) of this section, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of this subsection, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under this subsection, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under this section shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate ex-

clusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this title. The provisions of this title shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

(5) This title shall be held to apply to all existing cases now pending in any Federal court, under this title, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under this title may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this title shall not be grounds for denying him the benefits of this section.

(6) This title is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate. (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)